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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY, a division of KNIGHT NEWSPAPERS, INC.,

Appellant,

vs.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal From the Supreme Court of Florida.

BRIEF OF THE TIMES MIRROR COMPANY, AMICUS CURIAE.

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BRIEF OF THE TIMES MIRROR COMPANY, AMICUS CURIAE.

The Times Mirror Company ("Times Mirror") presents this brief as *amicus curiae,* by consent of both appellant and appellee, in support of appellant The Miami Herald Publishing Company (*"The Miami Herald"*). Times Mirror's vital interest in these proceedings stems from its publication of the *Los Angeles Times,* a privately owned metropolitan newspaper of general circulation, as well as the fact that wholly-owned subsidiaries of Times Mirror publish two metropolitan newspapers of general circulation, *Newsday* (Long Island, New York) and *The Dallas Times Herald* (Dallas, Texas) and a community newspaper, *Orange Coast Daily Pilot* (Costa Mesa, California).

Times Mirror has previously fought for the right of private newspapers to be free from governmentally forced publication and prevailed in the case of *Associates & Aldrich Company v. Times Mirror Company* (9th Cir. 1971), 440 F.2d 133.

Opinions Below.

The initial opinion of the Florida Supreme Court dated July 18, 1973 and the opinion denying rehearing dated October 10, 1973 have been reported at 287 So. 2d 78. The opinion of the Circuit Court of Dade County, reversed by the Florida Supreme Court, is reported at 38 Fla. Supp. 80 (1973). Copies of the three opinions are included in the Appendix.[1]

Jurisdiction.

The decision of the Florida Supreme Court sustained the constitutionality of Section 104.38, Florida Statutes, which *The Miami Herald* had contended to be in violation of the First and Fourteenth Amendments to the United States Constitution. The decision of the Florida Supreme Court was dated July 18, 1973; a duly presented Petition for Rehearing was denied by the Supreme Court of Florida on October 10, 1973. *The Miami Herald* filed a Notice of Appeal to this Court on November 1, 1973 pursuant to the provisions of Title 28, U.S.C. § 1257, subsection (2). [App. 45.]

This Court has postponed its final decision on the jurisdictional question. *Amicus* respectfully urges this Court to accept jurisdiction and to reverse the judgment below because:

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[1]App. 11, 15 and 39.

(1) The decision of the Supreme Court of Florida conflicts with recent decisions of this Court (*Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 36 L.Ed.2d 772; *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 37 L.Ed.2d 699; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367);

(2) The decision of the Supreme Court of Florida conflicts with directly controlling decisions of the United States Courts of Appeals (*Associates & Aldrich Company v. Times Mirror Company* (9th Cir. 1971), 440 F.2d 133; *Chicago Joint Board, Amal. Cloth. Workers v. Chicago Tribune Co.* (7th Cir. 1970), 435 F.2d 470, *cert. den.* 402 U.S. 973);

(3) The decision of the Supreme Court of Florida conflicts with the holding of the three-judge Federal District Court in *Resident Participation of Denver, Inc. v. Love* (D. Colo. 1971), 322 F.Supp. 1100; and

(4) The decision of the Supreme Court of Florida conflicts with the thoughtful opinion of the Supreme Judicial Court of Massachusetts in *Opinion of the Justices to the Senate* (1973), ... Mass. ...., 298 N.E. 2d 829.

Question Presented.

Is a state statute imposing criminal sanctions upon the refusal of a private newspaper to publish "free of cost any reply" submitted to it by any political candidate to an article published by the newspaper which "assails [his] personal character" or charges him with "malfeasance or misfeasance in office" or "otherwise attacks his official record" violative of the free press and due process clauses of the United States Constitution?

Constitutional Provisions Involved.

The First Amendment to the United States Constitution provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Section 1 of the Fourteenth Amendment states, in part:

> "* * * No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

Statutes Involved.

Section 104.38, Florida Statutes, a part of the Florida Election Code, provides:

> "§104.38 Newspaper assailing candidate in an election; space for reply.—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083."

Sections 775.082 and 775.083, stating the criminal sanctions for commission of a misdemeanor of the first degree, are reproduced in the Appendix.[2]

Statement.

In the fall of 1972, appellee Tornillo was a candidate for the Democratic Party nomination for a seat in the Florida House of Representatives. On September 20, 1972 and September 29, 1972, *The Miami Herald* published editorials unfavorably commenting upon Tornillo's candidacy.[3]

On September 27 and 30, 1972, Tornillo requested *The Miami Herald* to print statements submitted by him in reply to the published editorials.[4]

On October 1, 1972, Tornillo filed a civil action in the Eleventh Judicial Circuit seeking to require *The Miami Herald* to publish his reply pursuant to the provisions of Section 104.38 and further seeking recovery of damages for the failure of the newspaper to publish his statement. The Circuit Court dismissed the case with prejudice, holding that Section 104.38 was (i) void as an impermissible restriction upon freedom of speech and press in violation of the First and Fourteenth Amendments to the United States Constitution and

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[2]App. 48-9. The sections provide for a punishment of imprisonment not to exceed one year or a fine not to exceed $1,000. Although the Supreme Court of Florida interpreted Section 104.38 as providing for civil as well as criminal enforcement [App. 40], civil sanctions impeding free speech are subject to the same heavy burden of justification. (*New York Times Co. v. Sullivan*, 376 U.S. 254, 265, 277.)

[3]App. 5 and 8.

[4]App. 6 and 9.

(ii) void as an unlawfully vague and ambiguous criminal statute denying *The Miami Herald* due process of law under the Fourteenth Amendment.[5]

Tornillo appealed the judgment of the Circuit Court directly to the Supreme Court of Florida. On July 18, 1973, that Court issued a decision reversing the Circuit Court and holding that Section 104.38 does not violate the United States Constitution.[6] A petition for rehearing was denied.[7]

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[5]App. 11.
[6]App. 15.
[7]App. 39.

ARGUMENT.

In the name of assuring fair elections, the State of Florida has equated its private press to a governmentally-regulated community bulletin board obliged to display the unedited statements of political candidates whose "personal character" or "official record" has been impugned.

A fair election, the nominal goal of this right of reply legislation, is, of course, a laudable objective. Infringements upon a free press are usually attempted in the name of such desired ends as national security,[8] protection of personal reputation,[9] preservation of tranquility,[10] community morality[11] and fair housing for all races.[12]

Thus the Supreme Court of Florida provides the assurance that Section 104.38 "was enacted not to punish, coerce or censor the press but rather as a part of a centuries old legislative task of *maintaining conditions conducive to free and fair elections*. . . . To assure fairness in campaigns, the assailed candidate had to be provided an equivalent opportunity to respond; otherwise not only the candidate would be hurt *but also* the people would be deprived of both sides of the controversy." [App. 19.] According to that Court, the "statute *assures*, and *does not abridge*, the right of expression which the First Amendment guarantees. The

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[8]*New York Times Co. v. United States*, 403 U.S. 713.

[9]*New York Times Co. v. Sullivan*, 376 U.S. 254.

[10]*Brandenburg v. Ohio*, 395 U.S. 444; *Cohen v. California*, 403 U.S. 15; *Edwards v. South Carolina*, 372 U.S. 229.

[11]*Winters v .New York*, 333 U.S. 507; *Kingsley Films v. Regents*, 360 U.S. 684; *Interstate Circuit v. Dallas*, 390 U.S. 676; *Stanley v. Georgia*, 394 U.S. 557.

[12]*Organization for a Better Austin v. Keefe*, 402 U.S. 415.

statute supports the freedom of the press in its true meaning—that is, the right of the reader to the whole story, rather than half of it—and without which the reader would be 'blacked out' as to the other side of the controversy." [App. 32-33.]

The reversal of traditional free speech protections is covered with a scholarly patina supplied by Jerome A. Barron, one of counsel for appellee Tornillo. He has explained in the Harvard Law Review that preservation of a "true marketplace of ideas" compels abandoning the "romantic view" of the First Amendment and imposing governmental intervention upon editorial judgment in order to assure free access of the public to the means of mass communication.[13]

Although Florida has chosen to adopt this destruction of free speech in order to save it, no such drastic alteration of federal constitutional rights may be sanctioned.

1. The Burden of Justification Imposed Upon Regulation of Speech Is Heavy.

This Court throughout the 20th century has undertaken a primary responsibility of insuring that government does not interfere with publication by the press absent a compelling showing of dire public necessity.[14] Whether or not couched in terms of a "clear and present danger,"[15] the burden of justification imposed

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[13]Barron, *Access to the Press—A New First Amendment Right*, 80 Harv.L.Rev. 1641 (1967).

[14]*Schenck v. United States*, 249 U.S. 47; *Papish v. University of Missouri*, 409 U.S. 667.

[15]*Brandenburg v. Ohio*, 395 U.S. 444, 451-7 (Douglas, J.); Frantz, *The First Amendment in the Balance*, 71 Yale L.J. 1424 (1962); Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 Colum.L.Rev. 313, 330 (1952).

upon regulation of speech is heavy. (*New York Times Co. v. United States*, 403 U.S. 713, 714.) If this is, as Barron asserts, a "romantic" view of the First Amendment, it is nonetheless one thoroughly ingrained in the law of the land.

2. Compelled Speech Is as Invidious as Censored Speech.

Governmental action *compelling* speech is equally invidious to the state's activities in *restricting* speech. Although the usual attack upon freedom of speech and press is in the form of prohibiting publication, "[t]here is no difference between compelling publication of material that the newspaper wishes not to print and prohibiting a newspaper from printing news or other material." (*Associates & Aldrich Company v. Times Mirror Company* (9th Cir. 1971), 440 F.2d 133, 135; *Chicago Joint Board, Amal. Cloth. Workers v. Chicago Tribune Co.* (7th Cir. 1970), 435 F.2d 470, 478, *cert. den.* 402 U.S. 973; see *Avins v. State University of New Jersey* (3d Cir. 1967), 385 F.2d 151, 152-154, *cert. den.* 390 U.S. 520; Chafee, *Government and Mass Communications*, 633 (1947).) The proposition is surely self-evident. A virtually universal feature of totalitarian regimes is the Ministry of Information which directs the publication of news in a form favored by the state.[16]

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[16]A chilling example is the era of Nazi Germany. Daily press directives presented in exquisite detail governmental requirements for the presentation of news, down to specifying the obligatory press reaction to the Duke of Windsor's wedding. (Grunberger, *The 12-Year Reich, A Social History of Nazi Germany 1933-1945*, 395 *et seq.* (1971).) The inevitable deterioration of the quality of the press under such circumstances is illustrated by the author's notation that "[q]uite a few practising journalists, actual-

(This footnote is continued on next page)

3. The Florida Statute Inevitably Will Require Intervention in Editorial Decisions.

Government intervention is an indispensable adjunct of the administration of Section 104.38. In thrusting aside *The Miami Herald's* claim of unconstitutional vagueness, the Supreme Court of Florida construed the statutory right to require the publication of "any reply" as referring only to a reply which is "wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane." [App. 30.]

One may imagine the extent of involvement of the Florida courts in making advance determinations of the extent to which the proposed reply is responsive, libelous, slanderous, vulgar or profane. Indeed, Professor

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ly, far from resenting the fact that their columns had become official notice-boards, welcomed Goebbels's scheme because it freed them from the burden of responsibility." (*Id.* at 395.)

Such intrusions upon freedom are customarily promulgated in the name of freedom itself. For example, the military junta in Peru enacted a "freedom of the press law" which included a requirement that each newspaper print in their entirety, on the first page, all official government communications. (*Los Angeles Times*, January 25, 1970, § A, at 16, cols. 1-2.)

A survey of the International Press Institute reported that "[c]ompelling newspapers to publish official handouts or any other material inspired by the government is certainly one of the worst abuses of power. It is current practice in totalitarian countries. In Spain, for example, papers are bound to publish material issued by the government, but have to pretend that it is put out by the newspaper office itself." Further examples are cited from Yugoslavia, Lebanon, Ecuador, Argentina and Colombia. (*Government Pressures on the Press*, IPI Survey No. 4, Zurich, 99-101 (1955).) A further IPI publication detailed the activities of totalitarian governments in the Soviet Union, East Germany and Spain in issuing press "directives" requiring the publication of government inspired news. (*The Press in Authoritarian Countries*, IPI Survey No. 5, Zurich, 23-25, 87-89, 143-145 (1959).)

Barron himself recognizes the indispensable role of the judiciary in actively regulating any governmentally-compelled right of access. He concedes that *someone* must have the right to edit the contents of a newspaper since "the daily press cannot be placed at the mercy of the collective vanity of the public."[17]

It is no aid to the constitutionality of Section 104.38 to note that Florida judges rather than a Florida administrative agency will be administering the governmental supervision of Florida's press. Courts are agencies of government whose actions are measured by the same constitutional standards as are applicable to the other branches. (*Shelley v. Kraemer*, 334 U.S. 1; *New York Times Co. v. Sullivan*, 376 U.S. 254; *Bursey v. United States* (9th Cir. 1972), 466 F.2d 1059, 1082-1083.) Accordingly, judicial restraints upon speech also carry the heavy burden of justification. (*New York Times Co. v. United States*, 403 U.S. 713, 714; *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419.)

4. The Private Press Is Not Subject to the "Fairness Doctrine" Imposed Upon the Broadcast Media.

We read two recent decisions by this Court as reaffirming a commitment to protect the press from government intrusion upon the selection of material for publication.

Although broadcast media are by technical necessity subject to the degree of governmental regulation implicit in the award of licenses to utilize scarce frequencies (*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-8, 400-01), such regulation does not

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[17]Barron, *Access to the Press—A New First Amendment Right*, 80 Harv.L.Rev. 1641, at 1677 (1967).

include compelling radio or television stations to accept and broadcast editorial advertisements. (*Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 36 L.Ed.2d 772.) Mr. Chief Justice Burger's opinion, in part II concurred in by Mr. Justice Stewart and Mr. Justice Rehnquist, pointed out that "[t]he power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: First, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and second, the journalistic integrity of its editors and publishers." (36 L.Ed.2d at 792.) In part IV, for the Court, it was held that the Court of Appeals' imposition of a constitutional right of access to broadcast media was erroneous and constituted an unreasonable risk of governmental interference with the content of broadcast discussion of public issues. It was so held although "the use of a public source by the broadcast media permits a limited degree of Government surveillance, *as is not true with respect to private media*. . . ." (Emphasis added, 36 L.Ed.2d at 797.) Mr. Justice Douglas and Mr. Justice Stewart equated broadcast media to the private press insofar as the regulation of editorial content is concerned and rejected the constitutionality of government dictation of material to be broadcast or published. Even dissenters Mr. Justice Brennan and Mr. Justice Marshall, in footnote 12 to the opinion written by Mr. Justice Brennan, suggested that governmentally compelled publication of editorial ads in newspapers "would be impossible" and "would violate the First Amendment" because the "decision as to who shall operate newspapers is made in the free market, not by Government fiat." (36 L.Ed.2d at 829.) These

views render inappropriate the reliance of the Florida Court upon *Red Lion* and "fairness doctrine" applied by the FCC to broadcasters. [App. 24-26.]

In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 37 L.Ed.2d 669, Mr. Chief Justice Burger and Justices Douglas, Stewart and Blackmun dissented from a majority holding that it was constitutionally permissible for the City of Pittsburgh by ordinance to prevent the private press from listing help wanted advertisements under sexually segregated headings. The tenor of these dissents was that the Pittsburgh ordinance constituted an unconstitutional interference with the contents of a newspaper. The opinion of the majority relied upon the commercial character of the speech regulated and the underlying illegality of the sexual discrimination alleged to be fostered by the segregated ads. In its conclusion, the majority emphasized that nothing in the holding would be deemed to "authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial." (37 L.Ed.2d at 680.)

We recognize that it is chancy at best to attempt such a synthesis of cases involving the presentation of individual opinions, but *Columbia Broadcasting System* and *Pittsburgh Press* indicate to us a continued commitment to the untrammeled right of the private press, large and small, to determine the content of newspapers. The Supreme Judicial Court of Massachusetts recently shared this interpretation of *Columbia Broadcasting System* and *Pittsburgh Press* in advising that proposed

Massachusetts legislation requiring the publication of "reply" political advertising would violate the United States Constitition. (*Opinion of the Justices to the Senate* (1973), ... Mass. ....., 298 N.E.2d 829.)

5. The Florida Statute Will Inevitably Result in Self-Censorship.

The detrimental impact of Section 104.38 upon freedom of the press will be not only the direct intervention of government in editorial decisions, but also the chill of self-censorship. Publications considering a controversial article respecting a political candidate will perforce weigh the desire to publish against the risk of being forced to speak, verbatim, the words of others. The impetus to silence from such an eventuality is itself unconstitutional interference with freedom of speech and press. (*New York Times Co. v. Sullivan*, 376 U.S. 254, 279; *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 461-3.)

6. The Size of the Miami Herald Is Irrelevant to Its Constitutional Rights.

The offhand reference of the Supreme Court of Florida to the fact that *The Miami Herald* is "the largest newspaper published in Florida" [App. 22-23] is irrelevant to its rights of free speech and press. No rational theory supports the proposition that large newspapers are less free than others. No case supports the proposition that a special category of the press exists which is subject to editorial dictation by government. The Ninth and Seventh Circuits have expressly rejected the argument. (*Associates & Aldrich Company v. Times Mirror Company* (9th Cir. 1971), 440 F.2d 133, 134-6; *Chicago Joint Board, Amal. Cloth.*

Workers v. Chicago Tribune Company (7th Cir. 1970), 435 F.2d 470, 474 and 478, *cert. den.* 402 U.S. 973; and see *Resident Participation of Denver, Inc. v. Love* (D. Colo. 1971), 322 F.Supp. 1100.) This Court has vigorously protected the freedom of the largest newspaper in the United States without regard to its dominance in, at the least, the area of its publication. (*New York Times Co. v. Sullivan,* 376 U.S. 254; *New York Times Co. v. United States,* 403 U.S. 713.)[18]

7. The Record Does Not Demonstrate Any Justification Sufficient to Sustain the Restraint Imposed by Section 104.38 Upon Free Speech and Press.

In the light of the foregoing principles, Section 104.38 cannot stand. There is nothing in the record to support the untenable proposition that elections in Florida are in imminent danger of collapse absent compelled publication of candidates' statements in newspapers. No effort has been made to show a "serious and imminent" threat to the electoral machinery (*Craig v. Harney,* 331 U.S. 367, 373) or that no less drastic means exist to deal with that threat short of interfering with the editorial judgments of the private press (*Sherbert v. Verner,* 374 U.S. 398, 407). No such demonstration is possible. (See *Mills v. Alabama,* 384 U.S. 214.)

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[18]Newspapers, in their business aspects, are concededly subject to economic regulation, including that pertaining to the formation of monopolies. (*Citizen Publishing Company v. United States,* 394 U.S. 131; *Lorain Journal Co. v. United States,* 342 U.S. 143; *Associated Press v. United States,* 326 U.S. 1.) Those decisions hardly support governmental regulation of editorial content; rather, each emphasizes the entirely separate nature of economic, business regulation which does not trench upon editorial freedom. (*Cf. Grosjean v. American Press Co.,* 297 U.S. 233.)

The only justification seriously attempted to be advanced in support of the statute is the convoluted view of the First Amendment which supposes that government regulation of speech is the road to freedom.

8. The Florida Legislation Is Not a Mere Correction or Retraction Statute.

So-called "correction" or "retraction" statutes enacted in some of the states are inapposite to Section 104.38. Such statutes assume a false and libelous publication, actionable even in the light of the constitutional inhibitions upon defamation actions. The publisher is afforded the opportunity to correct in order to mitigate or eliminate damages he otherwise would be required to pay. (I Hanson, *Libel and Related Torts,* 149-161 (1969).) Far from constituting an infringement upon private editorial discretion, these statutes are legislative limitations upon the civil right of action for defamation and implement the concepts articulated in *New York Times Co. v. Sullivan,* 376 U.S. 254.

Conclusion.

The Florida Supreme Court reveals a disturbing sense of impatience and pique with the press. That Court, in surrendering news columns to political candidates desiring to issue government compelled and supervised replies, comments that the First Amendment is "not merely for a select few" and "did not create a privileged class" able to deny to the people freedom of expression. [App. 23.] The Court wished it to "be remembered that First Amendment Freedom of the Press is for the benefit of *all* the people and not just those who have invested money in the publishing business." [App. 43.]

It may be that vesting untrammeled discretion in private editors and publishers to choose the words they would publish has not always produced the most profound or even the fairest speech. However, our commitment to this freedom has served us well for nearly 200 years. We know of no state utilizing government controls upon the press which can point to a more unfettered intercommunication of ideas or, for that matter, fairer elections.

All temptations to create a judicial or administrative "referee" to insure that the press properly approaches its task run head on into the reality that such a proposition is an "iridescent dream" predicated upon the naive assumption that it is the "splendid fellows in our crowd [who] will be exercising the large powers over the flow of facts and opinions which seem to us essential to save society. . . ."[19]

If Florida's reach for utopia is undeterred by the sole body left with that opportunity, one may be sure that politicians across this country will hasten to employ the pages of private newspapers for their own purposes.

The nation will be the loser.

For the foregoing reasons, this Court should reverse the judgment of the Supreme Court of Florida.

Respectfully submitted,

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[19]Chafee, *Government and Mass Communications,* 709 (1947).